

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

REDACTED

In the Matter of the Accusation Against:)
EZECKIEL ZILKA, M.D.)
)
Physician's & Surgeon's)
Certificate No.: A-42725)
)

Respondent)

Case No.: 18-1997-76643
OAH No.: L-1999030419

CORRECTED
NOTICE OF NON-ADOPTION
OF PROPOSED DECISION

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted**. The Medical Board of California, Division of Medical Quality, will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit, including in particular, argument directed to the question of whether the proposed penalty should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available. This Corrected Notice of Non-Adoption of Proposed Decision serves to reflect the true date of the Notice of Non-Adoption.


To order a copy of the transcript, please contact the Transcript Clerk, Office of Administrative Hearings, 320 West 4th Street, 6th Floor, Los Angeles, CA 90013.

In addition to written argument, oral argument will be scheduled if any party files with the Division within 20 days from the date of this notice a written request for oral argument. If a timely request is filed, the Division will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed penalty should be modified. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Division. The mailing address of the Division is as follows:

Division of Medical Quality
MEDICAL BOARD OF CALIFORNIA
1426 Howe Avenue
Sacramento, CA 95825-3236
(916) 263-2524

Dated: May 15, 2000



PAMILA C. BALDO
Enforcement Legal Unit

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DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
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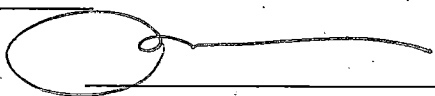
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Division of Medical Quality
MEDICAL BOARD OF CALIFORNIA
1426 Howe Avenue
Sacramento, CA 95825-3236
(916) 263-2524

Dated: March 15, 2000


PAMILA C. BALDO
Enforcement Legal Unit

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

EZECKIEL ZILKA, M.D.
9080 Venice Blvd., Suite 600
Culver City, CA 90232

Physician's and Surgeon's
Certificate No. A42725

Respondent.

Agency Case No. 18-97-76643

OAH Case No. L-1999030419

PROPOSED DECISION

This matter came regularly on for hearing before Carolyn Dee Magnuson, Administrative Law Judge of the Office of Administrative Hearings on December 13 through 23, 1999 at Los Angeles, California.

Steven H. Zeigen, Deputy Attorney General, represented the complainant.

Russell Iungerich, attorney at law, represented Ezeckiel Zilka who was personally present.

Oral and documentary evidence was admitted, and the record was left open through January 15, 2000 for the submission of written argument by Mr. Iungerich and of a written response thereto by Mr. Zeigen. Those documents were received and marked Exhibits G and 24 respectively; the record was closed; and the matter was submitted for decision. The Administrative Law Judge makes the following Findings of Fact:

1. Ron Joseph made the Accusation in his official capacity as Executive Director of the Medical Board of California ("Board").

2. Ezeckiel Zilka ("respondent") holds Physician and Surgeon's Certificate No A42725 issued to him by the Board in May 1986. At all relevant times, the license was in full force and effect.

3. Respondent attended medical school at The Hebrew University, Hadassah Medical School in Jerusalem, Israel, obtaining his M.D. in 1968. Thereafter, respondent came to the United States and continued his medical education, taking residencies in general surgery at Beth Israel Hospital in New York City, in general surgery at Mount Zion Hospital in San Francisco, in peripheral vascular and cardiac surgery at Arizona Heart Institute, and in cardiothoracic surgery at the Medical College of Wisconsin. During these residencies, respondent had training in cosmetic surgery.

4. Respondent was an Assistant Professor of Surgery at Louisiana State University for approximately eight years, and during his tenure there, he was responsible for training surgical residents in thoracic, vascular, and breast surgery, bariatric surgery and general surgery.

5. Respondent has been in private and group practice in the Los Angeles area since 1986.

6. In April 1996, the medical group with which respondent had been associated was dissolving. A nurse at the hospital where respondent did most of his surgeries told him that the Beverly Hills Outpatient Surgery Center ("BHOSC") was interested in having respondent perform surgeries there.

7. Respondent met twice with the owner/director of the surgery center to discuss respondent's associating with BHOSC. After the second meeting, respondent agreed to perform surgery at BHOSC on an as needed basis. The agreement was that BHOSC would provide surgical facilities and the patients on whom respondent would do surgery, and the surgery center would retain 30% of the compensation respondent received for each of the procedures he performed. Respondent testified that it was the surgery center's responsibility to maintain the patients' medical files and to bill the patients and/or their insurance companies for the services respondent performed. Respondent claims that he did not assign billing codes nor approve the prepared bills.

8. According to respondent, he was told by BHOSC's director that, if he performed two procedures on a patient during the same surgery, one of which was cosmetic and one of which was not, respondent was to prepare two sets of patient records, one for each type of procedure, *i.e.*, two medical histories, two consent forms, two operative reports, etc. Respondent explained that the purpose of the dual records was to preserve the patient's privacy by keeping the cosmetic procedure confidential. Respondent testified that he followed this procedure.

9. In June 1996, BHOSC had a flier inserted in a southern California Spanish language newspaper. That flier was intended to solicit members of the Hispanic community to come to BHOSC for cosmetic surgery.

10. The evidence established that BHOSC heavily relied on advertisements directed toward foreign born and minority communities through foreign language newspapers to market its cosmetic surgery services. BHOSC provided transportation from all over southern California to people who responded to their advertisements. Lieber Sarmiento ("Sarmiento"), who acted, inter alia, as the office manager for BHOSC, was also responsible for BHOSC's marketing efforts. Sarmiento was a surgical tech, but was often addressed by patients and staff alike as "doctor." It was not established that respondent had personal knowledge of this conduct.

11. F█████ E█████, who is solely Spanish speaking, saw one of those fliers and called the telephone number given on it because she was interested in having liposuction done. The telephone number belonged to the Del Prado Clinic that was located in Downey, California. Dr. Vennancio Prado, who owned and operated the Del Prado Clinic, had allowed his telephone number to be placed on the fliers as an accommodation to his son-in-law, Dr. Oscar Lael, who was a surgeon at BHOSC.

12. Subsequent to her telephone call, Ms. E█████ went to the Del Prado Clinic on June 3, 1996. The clinic records and the testimony of Dr. Prado indicate that Dr. Prado examined Ms. E█████ on June 3rd, on June 10th and on June 24th. None of those examinations included a rectal or a genitalia/pelvic exam. Dr. Prado explained that none of Ms. E█████'s symptoms or complaints required him to make those examinations and that Ms. E█████ had refused them. In particular, Ms. E█████ made no complaints to Dr. Prado of urine retention problems.

13. Dr. Prado did refer Ms. E█████ to BHOSC for the liposuction she desired. He did not send any of Ms. E█████'s records to BHOSC and did not discuss her medical history or his findings about her medical condition with anyone at BHOSC.

14. On June 24th or 25th, Ms. E█████ was transported to BHOSC in one of the facility's vehicles for a pre-surgery consultation. Respondent testified that he met with Ms. E█████ on June 24th and personally prepared an Initial Consultation Sheet dated on that date. That record states that Ms. E█████ came to the surgery center because she was suffering urinary stress incontinence and wanted surgical repair. Respondent said that surgery center personnel told him that Ms. E█████'s problem was urinary stress incontinence.

15. Respondent determined that Ms. E█████ suffered from urinary stress incontinence, cysto-rectocele and pelvic relaxation and that she should undergo

surgery for an anterior and posterior colporrhaphy, a retropubic urethropexy and a perineoplasty. In order to make this diagnosis, respondent would have had to conduct a rectal and vaginal examination of Ms. E [REDACTED].

16. There is no mention in Ms. E [REDACTED]'s BHOSC records for that first visit of her desire for liposuction. Respondent testified that he prepared a second Initial Consultation Sheet for Ms. E [REDACTED] for the cosmetic portion of the surgery, and it was not his responsibility to ensure that record was retained in Ms. E [REDACTED]'s file.

17. The Medical History filled out by Ms. E [REDACTED] – or on her behalf – at BHOSC was dated June 25th. The patient information sheet she filled out is not dated, but Ms. E [REDACTED]'s insurance information is provided on it.

18. Ms. E [REDACTED] is not sure of the date on which she first went to BHOSC. However, she is certain that she did not see or speak with respondent on that day, and she is also certain that respondent never examined her and particularly that he did not do a rectal and/or vaginal examination of her.

19. According to Ms. E [REDACTED], she met only with "Dr." Sarmiento, who is Spanish speaking, on that first visit. Sarmiento did his best to talk Ms. E [REDACTED] into agreeing to vaginal reconstruction, but she refused. At Sarmiento's suggestion, however, Ms. E [REDACTED] did agree to undergo a tummy tuck rather than liposuction. Ms. E [REDACTED] spent about 40 minutes talking with Sarmiento, and she left BHOSC that day believing that Sarmiento was the surgeon who would be performing her surgery.

20. Ms. E [REDACTED] returned to BHOSC on July 11, 1996 for surgery. When she got to the facility, she was given some papers by a clerk and told to sign them. She was told that these were her consent forms for surgery. The documents were not completely filled out; and they were written in English, which Ms. E [REDACTED] cannot read. Ms. E [REDACTED] testified that, at no time, did anyone at BHOSC, including respondent, explain the consent forms to her or tell her about the risks of the surgery she had agreed to. At no time did anyone tell her that, in addition to the tummy tuck, she would be undergoing vaginal surgery. Had Ms. E [REDACTED] been so informed, she would have refused to consent.

21. Ms. E [REDACTED] testified that she first met respondent about half an hour before surgery. Respondent did not examine Ms. E [REDACTED] at that time.

22. According to Ms. E [REDACTED]'s records, respondent ordered extensive blood tests done on the day of surgery, and Ms. E [REDACTED] testified that blood was drawn on that day. Respondent denies having ordered the tests, but they all show that respondent was the ordering physician. The tests were not begun on this blood until late on July 11th. The results of the testing were obviously not available to respondent for surgery.

23. Respondent is in an awkward position regarding the blood work. He should have ordered some lab work done in time to have the results for surgery, to ensure that Ms. E[REDACTED] had no health problems that would make surgery inadvisable. Respondent failed to do this. Ordering elaborate blood testing on the day of surgery was clearly improper. Not only was the scope of the testing excessive for the procedure being undertaken; but the testing was futile, since the results would be not be available before surgery.

24. If respondent is believed that he did not order blood tests for Ms. E[REDACTED] on the day of surgery, he is not relieved of his failure to order needed tests at an earlier time.

25. The anesthesiologist for Ms. E[REDACTED]'s surgery was Kevin Tehrani, M.D. ("Tehrani"). Tehrani was fresh out of medical school and had worked at BHOSC for eleven days.

26. According to Tehrani's testimony, he and respondent were the only two doctor's present during Ms. E[REDACTED]'s surgery. Tehrani recalls that respondent did a tummy tuck, as well as the vaginal reconstruction on Ms. E[REDACTED]. However, at respondent's direction, Tehrani did not mention the cosmetic portion of the procedure in his report of Ms. E[REDACTED]'s surgery. Also at respondent's direction, Tehrani listed Dr. Lael as the assistant surgeon for the procedure, even though Dr. Lael was never present during the surgery. Dr. Lael's testimony corroborated Tehrani's on that point.

27. Respondent denied directing Tehrani to omit mention of the cosmetic portion of the procedure from his report and insisted that Dr. Lael was present and did assist in the surgery. In making this last claim, respondent made a serious tactical error.

28. Respondent seeks to avoid responsibility for the irregularities in the records and procedures associated with Ms. E[REDACTED]'s case by denying knowledge of or responsibility for improper actions taken in connection with the E[REDACTED] case and by claiming that he prepared documentation that was removed from Ms. E[REDACTED]'s records by persons unknown to and unauthorized by him. For the most part, these claims cannot be either substantiated or disproved objectively because the records are insufficiently detailed to do either.

29. Respondent points out that, in weighing Tehrani's credibility, one must take into account the fact that Tehrani was indicted on federal charges of mail fraud based on his conduct at BHOSC and has entered into a plea agreement to resolve those charges; although at the time of the instant hearing, he had not pleaded nor been sentenced in that case. The California Medical Board also disciplined Tehrani, and that matter has been settled by stipulation. The inference sought is that respondent's version of the facts should be accepted over that of a confessed criminal.

30. The impression Tehrani gives is of a man who has recognized and accepted responsibility for his wrongdoing and is willing to pay the price exacted for his conduct. His demeanor as a witness was thoughtful and straightforward. His answers to the questions asked of him were unhesitating and responsive. There was no hedging, and there was no evidence of prevarication.

31. Still, the credibility determination would have been very close if it were not for the matter of Dr. Lael. The evidence established conclusively that Dr. Lael did not participate in the E[REDACTED] surgery. By insisting that Lael did participate, respondent established that he was lying about that issue, and the truthfulness of his testimony as to all issues was cast into doubt thereby.

32. Thus, Tehrani's testimony that respondent instructed him not to mention the cosmetic surgery in his report and told him to include Lael as the assistant surgeon is accepted as true over respondent's denials. Similarly, Ms. E[REDACTED]'s explanation of her first visit to BHOSC when she met only with Sarmiento, and her testimony about meeting respondent for the first time a half hour before surgery, and her claim that no one at BHOSC ever explained the consent forms to her or told her she would be undergoing vaginal surgery are all accepted as true over respondent's versions of the same events.

33. Ms. E[REDACTED]'s records contain two post-operative reports prepared by respondent. The first, which is misdated July 1, 1996, is hand written and refers only to the vaginal repair surgery. The second, is a printed report dated July 11, 1996, and it too refers only to the A&P colporrhaphy, retropubic urethropexy and the perineoplasty. Neither report mentions the tummy tuck; neither discloses that another procedure was done during the same surgery.

34. Respondent testified that he prepared operative reports for the cosmetic procedure, as well, but they had been removed from Ms. E[REDACTED]'s records.

35. In fact, it appears that every one of the records respondent claimed he prepared for Ms. E[REDACTED] that pertained to the cosmetic element of her surgery are missing from her records.

36. Ms. E[REDACTED] testified that, when she awoke from the anesthesia, she was very surprised to find that a catheter had been inserted, and that she was in a lot of pain. Even then, no one told her that she had undergone extensive vaginal surgery. When Ms. E[REDACTED] returned to BHOSC a few days later because her pain was unbearable, Sarmiento told her that was expected and there was nothing to be done. Ms. E[REDACTED] did not see respondent or any other doctor, and she was not told of the vaginal surgery. When she came in two weeks post-surgery to have the catheter and stitches removed, she saw respondent, who still did not tell her the true nature of her surgery.

37. K. V. was another of respondent's patients at BHOSC. Miss V. did not testify at trial, but respondent acknowledged that she was his patient and that on May 3, 1996, he performed surgery on Miss V. at BHOSC. There were two aspects to this surgery. First, respondent removed bilateral breast masses, and secondly, he replaced Ms. V.'s breast implants.

38. The Patient Information sheet for Ms. V. is dated May 3, 1996, as are the Medical History sheet and the insurance confirmation sheet. These documents are prepared on a patient's first visit to BHOSC. Thus, it is odd that the Initial Consultation Sheet for Ms. V., which was prepared by respondent, is dated April 29, 1996, four days earlier. Since Ms. V. lived in Chicago, Illinois and flew to Los Angeles just for the surgery, it is probable that the May date is accurate and that the only time she was at BHOSC was on May 3, 1996 - the day of surgery. The document dated April 29th is respondent's attempt to create the appearance that he had examined the patient prior to the day of surgery when he did not.

39. The Initial Consultation Sheet states that Ms. V. was complaining of bilateral breast lumps. It does not mention the fact that Ms. V. was also complaining about her breast implants and wanted to have them replaced. According to Ms. V.'s records, respondent concluded that bilateral breast biopsies were needed. Interestingly, Ms. V.'s insurance covered breast biopsies, but not breast augmentation or replacements thereof.

40. The Initial Consultation Sheet also states that Ms. V. had had no prior surgeries. Ms. V.'s patient history and the evidence established that she had had prior breast augmentation. Indeed, it was that surgery which was the genesis for the subject surgery. Thus, respondent's explanation - that he did not list the breast augmentation under prior surgeries because he did not consider it important - makes no sense.

41. Ms. V.'s records include two postoperative reports prepared by respondent, the first, dated May 3, 1996, is handwritten and identifies the procedure performed as being bilateral breast biopsies. The second report, also dated May 3, 1996, is printed and also identifies the surgery as being bilateral breast biopsies. Neither report includes or refers to the cosmetic surgery portion of the procedure.

42. Ms. V.'s Consent for Surgery Permit, her pre-surgery checklist, her history and physical record, her Informed Consent for Anesthesia; Waiver, the anesthesiologist's report and the pathologist's report all refer only to the breast biopsies and not to the implants.

43. There is no evidence other than respondent's testimony that separate but equal documents of the same nature were prepared by respondent or anyone else, detailing the cosmetic portion of Ms. V.'s surgical procedure.

44. The only documents in Ms. V's records that appear to relate to the breast implant replacement are a sheet of postoperative instructions for breast implantation and the identification tags from two mammary implants.

45. Ms. V's records contain extensive lab work. Unfortunately, her blood was taken on the day of surgery, and the results were not available until the next day. Moreover, most of the tests that were done were unnecessary for Ms. V's procedure. Respondent denies ordering the lab work, including that which should have been done prior to performing the surgery, but the lab forms show respondent as being the ordering physician.

46. In July 1996, respondent was also associated with Westside Surgery Center ("WSC"). It appears that this enterprise was organized in much the same way as BHOSC. Respondent was to provide surgical services on an as needed basis. WSC would provide the surgical facilities and the patients, keep the records and take care of the financial details.

47. L.P. is a native of Vietnam. She speaks passable English, but does not read English well. She saw an advertisement for cosmetic surgery in a Vietnamese language paper. She called the number in the ad and spoke to a woman who spoke Vietnamese. This woman asked Ms. P. about her insurance coverage, and Ms. P. provided the relevant information.

48. When the woman recontacted Ms. P., she stated that the insurance would not cover the liposuction that Ms. P. wanted but would cover a hernia repair. Ms. P. had no symptoms consistent with her having a hernia that needed repair.

49. The details of the agreement reached between Ms. P. and the WSC representative are not clear. Perhaps it was agreed that Ms. P. would undergo liposuction but the procedure would be billed to the insurance company as a hernia repair; perhaps it was agreed that Ms. P. would have a hernia operation, and the liposuction would be included as a lagniappe. In either case, the agreement was that Ms. P. would have the liposuction she desired at no cost to her, and the insurance company would be told only that Ms. P. had hernia surgery and would, therefore, pay for Ms. P.'s cosmetic procedure. Ms. P. stated that she was told Dr. Zilka would perform her surgery.

50. Ms. P. testified that she was scheduled for blood work, and that she drove herself to a lab in Van Nuys to get the lab work done. It is not clear what happened to this lab work since there are no reports in the patient's file. However, Ms. P.'s medical records from WSC show that on the day of surgery, extensive lab work was ordered and sent to a Los Angeles lab for processing. The records do not show who ordered the tests, and respondent denies being responsible.

51. Ms. P[REDACTED] testified that on July 14th or 15th 1996, she received a call from a woman who identified herself as being Mrs. Zilka. Ms. P[REDACTED] is sure of the name because she had heard it before. Mrs. Zilka denies making the call. The woman told Ms. P[REDACTED] that she would have surgery on July 17th at WSC.

52. Ms. P[REDACTED] was taken to WSC by the Vietnamese speaking woman along with two other Vietnamese women. Ms. P[REDACTED] met respondent for the first time at WSC no more than an hour before surgery. Ms. P[REDACTED] did not complain to respondent about any abdomen pain. Respondent did not physically examine Ms. P[REDACTED]; he did not take a medical history; he did not explain the procedures to her; and he did not go over the consent forms with her. Respondent did draw some lines on Ms. P[REDACTED]'s body and did talk about removing fat from her abdomen and hips.

53. Ms. P[REDACTED] is not sure when she signed the surgery consent forms or whether they were completely filled out at the time she signed them. Since she does not read English well, unless they were explained to her, she would have no idea what she was signing.

54. Interestingly, Ms. P[REDACTED]'s Consent for Surgery Permit has the words "tummy tuck/liposuction" crossed out and the words "incidental laparoscopy and incisional hernia repair" written in.

55. Respondent acknowledges that he first saw Ms. P[REDACTED] on July 17, 1996. He testified that he was called in to evaluate Ms. P[REDACTED] because of his reputation. Respondent stated that, when he examined Ms. P[REDACTED], he found she had an incarcerated incisional hernia that required immediate surgery. However, respondent's patient notes do not state that the hernia was incarcerated nor does his surgical report make that characterization. Respondent testified that he reluctantly decided to go ahead with surgery because of Ms. P[REDACTED]'s condition. And respondent acknowledges also doing some liposuction on Ms. P[REDACTED] during the surgery.

56. The anesthesiologist for Ms. P[REDACTED]'s surgery was Michael Hayavi M.D. ("Hayavi"). Hayavi testified that he worked at WSC as an independent contractor on a per diem basis. He recalled working with respondent at WSC a number of times. Hayavi had a difficult time recalling the P[REDACTED] surgery or any of its circumstances, but was able to identify his anesthesiology report and to testify that he filled it out at the time of surgery based on what he observed at the time of surgery and/or on what respondent told him. Hayavi was unable to recall what he meant when he wrote "full body liposuction" on his report. The same term is used on the Operating Room Record for Ms. P[REDACTED], but Hayavi did not know who filled that document out.

57. Following surgery, respondent signed a Physician Attestation Statement, which he had personally filled out. In the section on surgical procedure performed respondent included "SAL, abdomen"¹

58. Respondent also prepared an operative report that covered the hernia operation, but did not include or refer to the cosmetic surgery he performed. Respondent testified that he followed the procedure of preparing dual operative reports for his WSC surgery, although he does not recall being instructed to do so. Ms. P███'s records do not contain an operative report for the cosmetic surgery. Aside from the altered consent form, there is no consent for cosmetic surgery; there are no examination notes or other records for the liposuction.

59. Respondent's claim that he was at WSC on July 17th just to consult on Ms. P███ is not credible. The WSC representative told Ms. P███, weeks before she was actually scheduled for surgery, that respondent would be her surgeon. Ms. P███ was contacted at least two days before surgery by a woman who represented herself to be Mrs. Zilka.² On July 17th Ms. P███ went to WSC for surgery, not for a consultation with respondent. Dr. Hayavi went to WSC on that day to provide anesthetic for Ms. P███'s surgery. Respondent also appeared at WSC on July 17, 1996 for the purpose of performing surgery on Ms. P███. Ms. P███'s insurance company had already approved hernia surgery for her.

The truth is that, Ms. P███ was going to undergo hernia surgery that day because that operation was the mechanism by which WSC, Hayavi and respondent would be paid for the cosmetic surgery Ms. P███ wanted done.

60. Since Ms. P███ never complained to respondent about abdominal pain and since respondent never actually touched Ms. P███ until they were in the operating room, he had no basis to believe that she had a hernia.

61. When Ms. P███'s insurance company was billed for her surgery, it found inconsistencies with and gaps in the records. After the insurance company began an investigation into the claim, Ms. P███ received a call from a woman identifying herself as Mrs. Zilka who told Ms. P███ not to mention the cosmetic surgery aspect of the operation she had undergone or she would have to pay for the procedure personally. Mrs. Zilka denies making this call.

62. Ms. P███ also received a receipt in the mail showing that she had paid \$1,000 in cash on July 17, 1996, but the receipt did not identify to whom the payment was made or for what purpose. Ms. P███ testified that she had not paid any money to WSC or to respondent at any time.

¹ "SAL" stands for suction assisted liposuction.

² Regardless of the true identity of this woman, the call is evidence that respondent was associated with Ms. P███'s case prior to July 17th.

63. There are a number of similarities in these three cases. In each, the patient is a foreign born woman, not fluent with spoken or written English, who wants cosmetic surgery. In each the woman contacts an outpatient surgery center as a result of an ad in a foreign language newspaper. In each, the woman has health insurance, but the insurance does not cover the cosmetic surgery the woman wants. In each, the woman meets the respondent at the surgery center for the first time shortly before surgery begins. In each case, the respondent claims to have examined the patient prior to surgery, and each case, the evidence established that claim is untrue.³ In two cases, the women sign consents to surgery without any idea of what they are signing and without respondent or anyone else explaining the forms and the procedures to them. In each case, the patient is subjected to an unnecessary surgical procedure. In each, respondent dictates an operative report that fails to include the cosmetic portion of the procedure or to even refer to second report. In each case, excessive lab testing was ordered on the day of surgery. In each case, insurance claims were submitted based solely on the non-cosmetic portion of the surgery. In each case, there is no record of post-surgical care.

64. Respondent's defense is two-fold:

- a. Respondent had no responsibility, and therefore, he has no culpability, and
- b. Everyone but respondent is lying.

65. Thus, the argument progresses, respondent did not do – or is not responsible for – any of the acts or omission charged in the Accusation. Therefore, since complainant's experts relied on the allegations made against respondent in the Accusation in forming their opinions and since respondent is factually innocent, the experts' testimony is not relevant to respondent's conduct.

66. While the argument is elegant and logical, the evidence does not support the premise on which it rests – that respondent acted properly in his care of these three patients.

67. In fact, the testimony of complainant's three witnesses and the other evidence adduced at trial established that respondent acted below the applicable standard of care with the subject patients as follows:

- a. Respondent did not perform a pre-operative physical before performing surgery on the two of patients. In fact, he met each of the patients for the first time within one hour of performing surgery on them.

³ In two cases, the patients absolutely deny any such examination occurred. In the third case, the documentation is inconsistent.

b. Respondent did not obtain before surgery blood and urine tests needed to insure that the patient was able to tolerate surgery and/or that surgery was warranted.

c. Respondent performed surgery for which there was no medical indication on all three patients. Such surgeries were performed for the purpose of obtaining insurance coverage for the cosmetic surgeries the patients desired.

d. Respondent failed to ensure that the consent to surgery forms were properly filled out and explained to two of the patients before they were signed and before surgery was performed.

e. As the surgeon, respondent was responsible for creating complete and accurate patient records, but he failed to meet this responsibility. Respondent instructed an anesthesiologist to omit pertinent information from and to include untrue information in the anesthesiologist's report. Respondent documented non-existent complaints in the patients' records.

68. The lack of information about the cosmetic surgeries in the patients' records is particularly troubling. Respondent's claim that he prepared dual records for the cosmetic and functional aspects of the surgeries in order to protect the patient's privacy is not credible, particularly in light of the complete lack of supporting documentation. The purpose of respondent's failure to mention the cosmetic surgeries in his patient notes and operative reports is much more likely to have been to facilitate obtaining insurance coverage than it was a concern for the patients' interests. And it is unlikely that the information on the cosmetic aspects of an insured patient's case was ever written down or made a part of the patients' records.

69. However, even if one were to assume that respondent did prepare dual records and even if one were persuaded that respondent was not personally responsible for or even aware of the reports being omitted or removed from patient files, he is still responsible.

70. When respondent agreed to cooperate with the two surgery centers in obtaining insurance coverage for unwarranted surgeries, he entered into a civil conspiracy. As a conspirator, respondent became ultimately responsible for the acts of all of his co-conspirators. *Mox Incorporated v. Woods* (1927) 202 Cal. 675. Since respondent obtained financial benefit as a result of this conspiracy, it is fair and proper that he accept full responsibility as well.

It is not necessary for respondent to participate in or to even be aware of acts taken in furtherance of the conspiracy for him to be responsible for them and the consequences thereof. Thus, even if respondent did not personally order the untimely and excessive lab tests, as a conspirator, he is responsible for the ordering.

And even if respondent did make all of the necessary patient records, which were later removed by surgery center personnel, as a conspirator, respondent is responsible for their omission. In the same way, respondent is also responsible for the BHOSC's allowing Sarmiento to hold himself out to staff and patients as a doctor and to consult with patients concerning their surgeries.

71. Business and Professions Code section 123.5 provides that a prevailing complainant is entitled to reimbursement of the reasonable costs of investigation and enforcement. Respondent questions whether that section authorizes the reimbursement of attorneys' fees, but that question was resolved in *Schneider v. Medical Board of California* (1997) 54 Cal.App.4th 351 with a determination that such fees were included.

72. Complainant has provided cost certifications that claim eligible costs of \$45,484.61. Respondent has provided no evidence that these costs are in any way unreasonable, and there is nothing inherent in the information contained in the certifications that shows the claims to be unreasonable. Therefore, the presumption afforded such certifications under the statute establishes that they are reasonable, and complainant is entitled to reimbursement.

73. The evidence established that there is ample basis to discipline respondent for his conduct in the subject surgeries. The difficult question is what discipline is required.

74. The scheme that respondent participated in in 1996 is one in which he clearly put his economic interests above those of his profession, the insurance companies, and most unforgivably, his patients. In so doing, respondent compromised every professional and ethical standard he was expected to uphold. His conduct strikes to the very heart of his qualifications to be a physician. Even if respondent's technical skills are exceptional, that is just one aspect of his professional obligations. If he is unable or unwilling to fulfill his fiduciary responsibilities, his technical skill is irrelevant.

75. Unfortunately, respondent's reasons for participating in the conspiracy are unknown, and it is thus, difficult to determine if there are circumstances under which, in the future, respondent would again compromise his professional responsibilities and put his patients at risk.

76. On the other hand, respondent has had a long career without any other similar occurrences, and he has continued to practice medicine since these events, without engaging in similar conduct.

77. Weighing these factors, it appears that the public interest can be adequately protected by allowing respondent to continue practicing under a probationary license which is properly conditioned.

* * * * *

Based on the forgoing Findings of Fact, the Administrative Law Judge makes the following Determination of Issues:

1. Cause exists under the provisions of Business and Professions Code section 2234(b) to discipline respondent's license for unprofessional conduct in that he was grossly negligent, as set forth in paragraphs 19, 20, 21, 22, 23, 26, 32, 33, 26, 38, 39, 40, 41, 42, 45, 49, 50, 52, 53, 55, 58, 59, 60, 62, and 67.
2. Cause exists under the provisions of Business and Professions Code section 2234(c) to discipline respondent's license for repeated acts of negligence, as set forth in paragraphs 19, 20, 21, 22, 23, 26, 32, 33, 26, 38, 39, 40, 41, 42, 45, 49, 50, 52, 53, 55, 58, 59, 60, 62, and 67.
3. Cause exists under the provisions of Business and Professions Code section 2234(e) to discipline respondent's license for acts involving dishonesty which are substantially related to the qualifications, functions or duties of a physician and surgeon, as set forth in paragraphs 16, 20, 26, 27, 31, 32, 36, 38, 49, 52, 55, 59, 60, 67, 68, and 70.
4. Cause exists under the provisions of Business and Professions Code section 725 to discipline respondent's license for excessive use of diagnostic procedures.
5. Cause exists under the provisions of Business and Professions Code section 810 to discipline respondent's license for submitting a false insurance claim and/or preparing a writing in support thereof.
6. Cause exists under the provisions of Business and Professions Code section 2261 to discipline respondent's license for knowingly making a document related to the practice of medicine that falsely represents the existence of a state of facts.
7. Cause exists under the provisions of Business and Professions Code section 2262 to discipline respondent's license for altering or modifying the medical records of any person with fraudulent intent.
8. Cause exists under the provisions of Business and Professions Code section 2264 to discipline respondent's license for aiding and abetting the unlicensed practice of medicine.

9. Cause exists under the provisions of Business and Professions Code section 2266 to discipline respondent's license for failing to maintain adequate and accurate records.

10. Cause exists under the provisions of Business and Professions Code section 123.5 to award costs to complainant in the amount of \$45,484.61, as set forth in paragraph 71.

* * * * *

WHEREFORE, THE FOLLOWING ORDER is made:

Certificate No. A42725 issued to respondent Ezeckiel Zilka is revoked, pursuant to Determination of Issues 1 through 9, separately and for all of them. However, revocation is stayed and respondent is placed on probation for six years upon the following terms and conditions.

1. Within 15 days after the effective date of this decision the respondent shall provide the Division, or its designee, proof of service that respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent or where respondent is employed to practice medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to respondent.

2. As part of probation, respondent is suspended from the practice of medicine for 60 days beginning the sixteenth (16th) day after the effective date of this decision.

3. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California.

4. Respondent shall submit quarterly declarations under penalty of perjury, on forms provided by the Division, stating whether there has been compliance with all the conditions of probation.

5. Respondent shall comply with the Division's probation surveillance program. Respondent shall, at all times, keep the Division informed of his addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record. Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California that lasts, or is contemplated to last, more than thirty (30) days.

6. Respondent shall appear in person for interviews with the Division, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

7. Within 90 days of the effective date of this decision, respondent shall submit to the Division or its designee for prior approval, a clinical training or educational program in medical record keeping. The exact number of hours and specific content of the program shall be determined by the Division or its designee. Respondent shall successfully complete the training program and may be required to pass an examination administered by the Division or its designee related to the program's contents.

8. Within 60 days of the effective date of this decision, respondent shall enroll in a course in Ethics approved in advance by the Division or its designee, and shall successfully complete the course during the first year of probation.

9. In the event respondent should leave California to reside or to practice outside the State or for any reason should respondent stop practicing medicine in California, respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which respondent is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the Division or its designee shall be considered as time spent in the practice of medicine. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary period.

10. Within 60 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval a community service program in which respondent shall provide free medical services on a regular basis to a community or charitable facility or agency for at least 10 hours a month for the first 24 months of probation.

11. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

12. The respondent is hereby ordered to reimburse the Division the amount of \$45,485. Commencing 60 days after the effective date of this decision, respondent shall pay the Board \$1,500 per month. Failure to reimburse the Division's

cost of its investigation and prosecution shall constitute a violation of the probation order.

13. Respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Medical Board of California at the end of each fiscal year. Failure to pay such costs shall be considered a violation of probation.

14. Following the effective date of this decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may voluntarily tender his/her certificate to the Board. The Division reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, respondent will no longer be subject to the terms and conditions of probation.

15. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

16. Upon successful completion of probation, respondent's certificate shall be fully restored.

Dated: February 14, 2000



CAROLYN DEE MAGNUSON
Administrative Law Judge
Office of Administrative Hearings